Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-834

McAX SIGN COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fifth Circuit Court of Appeals entered in this proceeding on August 1, 1978.

OPINIONS

The opinions of the NLRB was reported at 231 NLRB, No. 158 (1977). This decision was reported in synopsis form at 96 LRRM 1151 and 77-8 NLRB Dec. 18545. The decision of the lower court was reported at 576 F.2d 62, 98 LRRM 3097, 84 Lab. Cas. 10686 (5th Cir. 1978).

JURISDICTION

Judgment enforcing the order of the Board was entered by the Fifth Circuit on August 1, 1978. A timely Motion for Rehearing was filed and an order overruling this Motion was entered on September 21, 1978. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals has misapprehended or grossly misapplied the substantial evidence standard of review to a question of unequivocal intent where it sustains a finding of unequivocal intent to be bound by group action in bargaining despite the existence in the record of unrefuted and unexplained evidence which clearly indicates an individual approach to bargaining.

2. Whether the Court of Appeals has misapprehended or grossly misapplied the substantial evidence standard of review to a question of unequivocal intent where it sustains a finding of unequivocal intent to be bound by group action in bargaining which is based primarily on the Board's construction of the written document, despite the fact that the construction given the document by the Board is wholly unreasonable; further, whether the Court of Appeals should have properly reviewed the construction of this document free of the substantial evidence standard of review.

3. Whether the Court of Appeals has erroneously placed the burden of negating an intent to be bound by group action in bargaining upon the employer.

STATEMENT OF FACTS

Petitioner, McAx Sign Company, services, repairs, erects and manufactures signs in the Dallas-Fort Worth Metropolitan Area. All employees who are Union members are represented by Local 59 of the International Brotherhood of Electrical Workers.

In 1968, 1971 and 1973, McAx and a varied group of other sign companies signed collective bargaining contracts with the Union. Outside of the mere execution of the agreements by McAx and an assortment of its competitors in 1968 and 1971, General Counsel offered no evidence as to the bargaining history or course of negotiations prefacing those agreements. The course of conduct for the 1973 negotiations was begun by individual employer contracts and proposal exchanges with the Union and concluded with individual execution of the agreements. McAx did participate in group bargaining sessions along with other sign contractors.

The 1976 collective bargaining negotiations, the subject of this suit, were also preceded by the exchange of sixty-day notice letters between the Union and individual employers, including McAx. Each employer sent its individual proposals, and the Union replied with its contract demands to each of the employers. The Companies' proposals had the effect of terminating the contract, which otherwise would have continued on a year-to-year basis. These letters from McAx and its competitors were exchanges directly with the Union without the clearance of or notice to any intermediary organization, and without copies to or consultation with the other employers.

The 1976 negotiations between the Union, McAx and its competitors were conducted over a period of approximately two months. Meetings were held on Tuesday of each week, except for the seventh and last session held on Monday, June 28, 1976. Simpson attended each session, except the last. At the second meeting, the employers agreed to try and consolidate their proposals because they were duplicitous and overlapping.

At the close of the sixth meeting, held on Tuesday, June 22, Hicks stated that no further meetings would be held until after July 1. Subsequently, on short notice to Simpson, the Union and the representative from Heath and Company scheduled a meeting for June 28. Each of the management representatives was notified of the meeting, including Simpson. However, Simpson had already made other business appointments and was unable to attend the meeting. When his attempts to contact Hicks by telephone were to no avail, Simpson notified Hicks of his inability to attend the session by special delivery letter.

At the June 28 meeting, the Union reached an agreement with those employers present. On or about July 2, Hicks mailed a letter to four of the sign companies which had participated in the negotiations. This letter requested the employers to sign the proposed modification "so they can be a part of this new agreement." Simpson did not sign and return the letter to Hicks. On July 22, Hicks sent McAx a letter concerning the change in wage rate, to which Simpson did not respond. After receipt of the formal agreement on or about July 29, Simpson advised Hicks, by a letter dated August 2, without copies to anyone else, of his intention not to enter into the agreement as tendered by the Union.

The Administrative Law Judge (ALJ) held that McAx was part of a multiemployer bargaining unit and was bound by the contract agreed upon at the June 28 meeting. The National Labor Relations Board (Board) adopted the ALJ's opinion and judgment (with a minor modification not material here). McAx petitioned the Fifth Circuit for a denial of enforcement and the Board cross-petitioned for enforcement. A divided panel granted enforcement. The Court of Appeals had jurisdiction of this matter under 29 U.S.C. §160(f).

REASONS FOR GRANTING THIS WRIT

A. The record clearly contains unrefuted evidence that McAx did not intend to be bound by group action.

This case presents a question regarding a proper application of the substantial evidence standard of review to a test of *unequivocal* intent to be bound by group action. The ALJ specifically found that certain objective conduct of McAx (and other contractors) — the submission of individual proposals — was "an indicium of individual bargaining." This holding is proper and is consistent with the Board's prior decision in *Van Eerden Co.*, 156 NLRB 496, 499 (1965). Logic dictates that if the contractors' objective conduct includes unrefuted and unexplained manifestations of an individual approach to bargaining, then there can be no finding of an *unequivocal* intent to be bound by group action.

> [A] multiemployer unit, *unlike other types of bargaining units, is consensual in nature.* The Board has consistently held that "the essential element warranting the establishment of multipleemployer units is *clear evidence* that the employers *unequivocally intend* to be bound in collective bargaining by group rather than by individual action. *The correlative standard for excluding an employer from such a unit is evidence of an intent to pursue an individual course of action with respect to labor relations.*" [Footnotes omitted] [Emphasis added]. *Ruan Transport Corp.*, 234 NLRB No. 31, 97 LRRM 1195, 1197 (1978).

The ALJ and the lower court attempt to explain away the individual proposals by the subsequent consolidation of the various employer's proposals. The crucial unstated premise of their argument is that the sole significance of the proposals was to set out the subjects for bargaining, for the only effect of the consolidation was to adjust the subjects of bargaining. What this premise ignores is the fact that the individual submissions had a second, and perhaps even more important, effect. The proposals were the method by which a party to the contract — here, the individual contractors — elected to terminate the prior agreement rather than permitting it to remain in effect for another year.

The evidence indicates that, as between the employers, *each individual contractor* exercised the independent right to decide whether to terminate the contract or to permit it to remain in force. This was done without prior consultation between the employers. Each employer also decided the subjects it felt needed to be the subject of negotiation. After these decisions had been made by the individual employers, the evidence shows that *in one year*, 1976, the contractors agreed that their proposals were substantially the same and

agreed to *try* and combine duplicitous proposals into one. The evidence also shows that this was, in fact, done. The evidence does *not* show that this was the standard procedure since the record is silent on this question.

Since the proposals were individually submitted by various contractors, without prior consultation among themselves, it is clear that the decision to terminate the prior contract was individually made by each employer and was not the result of group action. The Union was well aware of this fact since it received separate and distinct proposals from each employer and, in turn, submitted its own proposals to each individual contractor. It was precisely this conduct that previously lead the Board to hold that an employer's "separate decision to renegotiate the contract and his individual approach to the Union about this matter is, we think, inconsistent with any understanding on his part that there existed a legal relationship between the parties requiring unitary action by the three employers." *Van Eerden*, 156 NLRB at 199.[1] It is this effect of the proposals, and the holding in *Van Eerden*, which has been consistently ignored by the decisions below.

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[1]The Court of Appeals attempt to distinguish *Van Eerden*, 576 F.2d at 66 n.4, fails for several reasons. First, the "additional facts" cited were not the primary justification given by the Board for its decision in *Van Eerden*; the single, crucial factor was the individual decision by the employers to terminate the prior contract. This factor has been completely ignored by the decisions below. The contrasts between these decisions can be seen by comparing the following quotations:

> This argument assumes that the submission of proposals before or at the commencement of negotiations is consistent only with an intent to bargain individually, an assumption which we reject. *McAx*, 576 F.2d at 68.

> Kuczinski's separate decision to renegotiate the contract, and his individual approach to the Union about this matter is, we

(continued)

The subsequent consolidation of proposals in no manner negates or explains the clearly individual decision to terminate the prior contract. General Counsel made no effort to produce any evidence concerning the exchange of proposals in any year which would indicate any group action by the employers or any action by the Union which would reflect an understanding that the employers were to be treated as a group for this purpose. The only evidence is that the Union likewise made its proposals to each individual contractor, rather than on a group basis.

Thus, the record establishes clear, objective conduct by McAx and other contractors which indicates an individual, not group, approach to bargaining. There is no substantial evidence to support a conclusion that this inference has been rebutted.

The net effect, then, is that the record contains an unrefuted and unexplained finding that McAx and other contractors engaged in objective conduct at the outset of these negotiations which evidenced an individual approach to bargaining. Given this fact, Petitioner is unable to see how a finding of unequivocal intent can be sustained, even on a substantial evidence review. The best that can be said for this record is that it contains evidence of conflicting manifestations of intent. By definition, this does not satisfy the requirement that the manifestation of intent be unequivocal. "Unequivocal" is defined as "Undisguised or

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(footnote continued from preceding page)

think, inconsistent with any understanding on his part that there existed a legal relationship between the parties requiring unitary action by the three employers. *Van Eerden Co.*, 156 at 499.

It is interesting to note that *Van Eerden* also involved joint employer proposals, the very fact relied upon to "distinguish" this case from *Van Eerden. Id.* at 498.

unobscured; admitting of no doubt or misunderstanding; clear." The American Heritage Dictionary of the English Language (1976), p. 398; and "not equivocal; leaving no doubt. . .expressing only one meaning; leading to only one conclusion. . . ." Webster's Third New International Dictionary (Unabridged) (1965), p. 2494.

A comment appropriate to this case was made by the dissent in *NLRB v. Beckham*, 564 F.2d 190, 195 (5th Cir. 1977):

> My colleagues have, I am afraid, overstepped the bounds of descriptive lexicography and have wrestled unexpected new meaning from the word "unequivocal." What they find to be unequivocal I find to be fraught with ambiguity, uncertainty and disguise. (Fay, J., dissenting and adopting dissent below).

Justice Godbold made a similar point in his dissent below:

> On the thin and equivocal evidence in this case it is pure speculation to assume that the ALJ meant "unequivocal" when he did not say so. Indeed, one could infer that he could not bring himself to make a finding so embarrassingly bereft of support. *McAx*, 576 F.2d at 68.

Moreover, the attempt to "explain" the individual intent shown by the separate proposals by referring to the subsequent consolidation fails to take into consideration two uncontested facts. First, the decision to consolidate was a *voluntary* one on the part of the contractors and this decision was reached *after* negotiations had begun. Thus, it seems clear that the negotiations at least *began* on an individual basis. Therefore, McAx has not manifested an unequivocal intent, *from the outset*, to be bound by group action.

It is also significant that the Union representative conceded that the *reason* for the consolidation of proposals was to dispose of overlapping and duplicitous proposals by the various contractors. Thus, it would appear that individual contractors were not giving up any substantial individual rights by agreeing to the consolidation. Agreement to consolidate proposals *on the basis that the individual proposals were substantially the same* obviously undermines the "multiemployer unit" implications of the adoption of joint proposals. Again, it is significant that General Counsel failed to present any evidence regarding any combination of proposals from prior years, although he did adduce testimony that individual contractors submitted separate proposals in 1973. Thus, there is no way to evaluate the combination of proposals in light of past bargaining history since there is no evidence as to how the parties treated individual proposals in negotiating sessions prior to 1976.

The majority below also stated that McAx's submission of individual proposals was "explained" by its prior participation in bargaining on a multiemployer basis. If this means that McAx has previously agreed to be bound by group action, it assumes the ultimate question presented by this appeal; such circularity of reasoning would indicate a serious flaw in the Court's rationale. If, however, it was merely intended as a factual statement that McAx previously participated in group bargaining, then the Court improperly concluded that the bargaining history, which is not necessarily inconsistent with bargaining on an individual basis, determined the inference to be drawn (or not to be drawn) from ambiguous conduct.

It is improper to infer an unequivocal intent to be bound by group action *solely* from a history of joint negotiations and execution of the same contract *where there is evidence which indicates a contrary intent. See Ruan Transport*, 97 LRRM at 1197; *Van Eerden*, 154 NLRB at 499. It is equally improper, or perhaps even more so, to assume an unequivocal intent from this bargaining history and then require that any specific evidence as to a contrary intent explicitly negate an intent to be bound by group action. Yet, this is the effect of the Court's analysis of the individual submission of proposals. The Court dismisses the individual submissions as "ambiguous" and then resolves this ambiguity by referring to the bargaining history.

If evidence of prior bargaining on a group basis is used to explain the individual submission of proposals, then any evidence which is not utterly inconsistent with a multiemployer bargaining unit can be "explained" by the inference of an unequivocal intent to be bound by group bargaining derived from a history of joint bargaining. Effectively, then, in any case where the employer has previously participated in group bargaining, the Court requires the party denying the multiemployer unit to produce evidence which *expressly* negates any intent, much less an unequivocal intent, to be bound by group action.

This burden, however, is not properly placed on the Petitioner. In the first place, the Board's own standard requires that specific evidence indicating a lack of actual intent to be bound by group action be "equally considered in determining the basic issue". *Van Eerden*, 154 NLRB at 499. The panel's opinion clearly shows that the panel did not *equally consider* the specific evidence of individual proposals (which the ALJ conceded indicated a lack of

intent to be bound by group action); rather, the panel inferred unequivocal intent to be bound by group action from the bargaining history and then permitted this inference to control over the contrary evidence. 576 F.2d at 68. Drawing conflicting inferences from *different* evidence and then saying one inference controls over another is not equal consideration, particularly where the standard is unequivocal intent.

Secondly, it does not satisfy the Supreme Court's requirement that the Court review the record *as a whole* in determining whether there is substantial evidence to support the ALJ's award. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456 (1951). In effect, the Court is ignoring contrary evidence unless it shows an express negation of an intent to be bound by group action; this does not constitute a review of the record as a whole.

Third, this method of review applies an improper standard. The proper test requires the General Counsel to establish McAx's unequivocal intent to be bound by group action. However, the Court is placing the burden on McAx to unequivocally state that it did *not* intend to be bound by group action. This is the standard required for an employer attempting to withdraw from a multiemployer bargaining unit and is improperly utilized in this case.

The Court's confusion of the two standards is reflected in its citation of *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55, 57 (10th Cir. 1966); *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1005, 875 S. Ct. 711, 17 L.Ed. 544, and *NLRB v. Sklar*, 316 F.2d 145 (6th Cir. 1963). The rule laid down in these cases is predicated on the existence of a

multiemployer bargaining unit. That, however, is the ultimate question on this appeal. Reference to this standard, then, is wholly inappropriate for the purpose of determining McAx's unequivocal intent.

The specter of "disruption" of the bargaining process, raised by the Court below, is a potential hazard whenever one employer, who is participating in group negotiations, withdraws. However, the Board has determined that this is a risk which is to be run whenever there is no express agreement to be bound by group action and the employer has not unequivocally manifested an intent to be so bound. Any flaw in this approach are flaws in the Board's standard, not the conduct of the individual employer.

The Union is charged with knowledge of the appropriate standard and can take whatever steps it felt necessary to clarify the employer's intent. Where it does not do so, it runs the risk of having one or more employers refusing to follow the lead of the majority. The Union's failure to clarify its position and then claim surprise when the employer insists on his rights does not justify an ex post facto application of a greater burden on the employer. Yet, that is precisely the effect of the Court's decision, particularly as it relates to the discussions surrounding *Tulsa Sheet, Sheridan Creations* and *Sklar.*

To recapitulate, the record in this case contains undisputed evidence of objective conduct which clearly indicates that McAx intended to bargain on an individual rather than a group basis. Certainly, individual decisions to renegotiate a contract are inconsistent with any understanding that the employers are bound by group action. Since there is no evidence which reconciles this individual conduct with an intent to be bound by group action, there

can be no finding of an unequivocal intent to be bound by group action. The decisions to the contrary can only be explained by a failure to correctly comprehend or apply the appropriate standards.

Particularly, it appears that the burden to expressly negate an intent to be bound by group action was improperly placed on McAx. Undisputed evidence contrary to the result below has been effectively disregarded or discounted without justification. This does not constitute a finding of unequivocal intent based on all the evidence nor does it constitute a review of the evidence as a whole. This decision effectively places the burden of negating an intent to be bound by group action on all employers who engage in group bargaining. If that is to be the law, it should be stated explicitly, rather than done in the guise of an inconsistent standard. The Court of Appeals decision amounts to an abdication of its responsibility under 29 U.S.C. §160(e)(f) and this Court's decision in *Universal Camera.* Therefore, this Court should grant the Writ of Certiorari to correct the manifest error and to instruct the lower courts as to their duty in reviewing administrative decisions.

B. The construction of the contract was manifestly erroneous.

The Court of Appeals' and ALJ's conclusion that the agreements purported to be between the Union and the Neon and Electrical Sign Companies of Dallas, Texas,[2] is completely without support in the record. This conclusion was based solely on a grossly erroneous and unwarranted

reading of the contract's first paragraph:

> This Agreement entered into this First Day of July, 1976, between the Neon and Electric Sign Companies of Dallas, Texas, *whose names are affixed to the final sheet of this Agreement*, hereinafter called the "Employer" and Local Union No. 59 of the International Brotherhood of Electrical Workers, hereinafter called the "Union". This Agreement shall be binding on the "Union" *and each individual "Employer"* who are parties hereto for the full term thereof. (Emphasis Added)

The Court's conclusion completely ignores the language following the phrase. If "Neon and Electrical Sign Companies of Dallas, Texas" is intended as an associational name, then the entire phrase is a single proper noun. If, however, it is simply a generic or shorthand term, which does not even *purport* to describe an association or group of any type, then the noun is "companies", a plural noun referring to McAx and the other contractors; the remaining language in the phrase consists of modifiers of this noun. If it is a singular associational name, then the use of the term "names" in the following clause is grammatically incorrect because the nouns do not agree in number. The phrase "whose names are affixed" makes absolutely no sense if "Neon and Electrical Sign Companies of Dallas, Texas" is construed as an associational name.

[2]The acronym "NESCDT" has been used during the course of this litigation to refer to the purported association. However, it should be noted that this acronym does not appear in the contracts or correspondence between the parties. It is solely a creation of this litigation and should not be viewed as a tacit recognition that it is an associational name.

Absolutely the only fact from which it can be inferred that this is an associational name is that the phrase is capitalized. Normally, this might suggest a proper noun. Taken in context of the entire contract, however, it is obvious that this conclusion is not valid here. Basically, a review of the contract reveals a pervasive practice of capitalizing common nouns. For example, in the next paragraph, the phrase "Neon and Electrical Sign Industry" is capitalized. It has never been suggested that this phrase "purports" to be the title of a group or organization. Obviously, it is intended as a reference to a particular industry and is a common noun with modifiers, rather than a proper noun. By way of further example, the following phrases are capitalized in the 1973 contract: "Sign Concern", "Electrical Sign Industry", "Sign Men", "Sign Electricians", "Journeyman Sign Electrician", "Assistant Sign Electrician", and "City Electrical License". Given the circumstances, the only reasonable interpretation of the phrase "Neon and Electrical Sign Companies of Dallas, Texas" is as a generic or shorthand phrase used to refer to the various individual contractors; it is not an associational name.

This construction of the contract is further mandated by the last sentence of the introductory paragraph quoted above. It states that the parties to the contract are the union and *each individual employer*, not the union and the purported association. Given these facts, the assumption that the contract was purportedly between the union and an association is wholly without support in the record. Thus, the ALJ's and the majority's reliance on the purported association is misplaced.

Although not directly passed on by the panel below, a question which permeates this decision is the appropriate

standard for reviewing the Board's interpretation of a written contract. A prior Fifth Circuit panel has held:

> A decision of the Board will stand when based on substantial evidence, viewing the record in its entirety. This special consideration is accorded of Board findings of fact and mixed questions of fact and law because of the Board's experience in the specialized field of labor law. *Where, as in this case, the crucial issue is the legal significance of a written statement, neither the statute authorizing review nor respect for the Board's expertise so limit our review.* [Citations and footnotes omitted] (Emphasis Added) *Swearingen Aviation Corp. v. NLRB*, 568 F.2d 458, 463 (5th Cir. 1978); *also see Rosen v. NLRB*, 455 F.2d 615, 617 (3rd Cir. 1972).

However, other courts have concluded that deference is also due the Board's interpretation of a contract, saying that if "the Board's interpretation has a reasonable basis in the contract terms, the Act's policies and the Board's expertise, it is entitled to deference". *NLRB v. C. K. Smith & Co.*, 559 F.2d 162, 167 (1st Cir. 1977). Yet another Fifth Circuit panel apparently adopted this view in *Newspaper Production Co. v. NLRB*, 503 F.2d 821, 830 (5th Cir. 1974). Since the keystone of general counsel's case (and the opinions below) is the assumption that the prior contract *purported* to be between the Union and an association, the validity of that assumption and the standard by which it is to be reviewed is of central importance. Petitioner submits that the appropriate standard is that set out in *Swearingen.*

CONCLUSION

The decision by the Court of Appeals has disregarded and confused the appropriate standard for reviewing of this case and the evidence clearly negates any finding of unequivocal intent to be bound by group action. Therefore, this Court should grant this Writ of Certiorari to clarify the standards to be applied in this type of case and to prevent a gross misapplication of the appropriate standard.

Respectfully Submitted,

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APPENDIX A

McAX SIGN COMPANY, INC.,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent, Cross-Petitioner.

No. 77-3013.

United States Court of Appeals,
Fifth Circuit.

July 10, 1978.

Petition for Review and Cross Application For Enforcement of An Order of the National Labor Relations Board.

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

SIMPSON, Circuit Judge:

As in *N.L.R.B. v. Beckham, Inc.*, 564 F.2d 190 (5th Cir. 1977), "[t]he sole issue before the Court is whether substantial evidence on the record considered as a whole supports the finding of the National Labor Relations Board that [Petitioner-Cross-Respondent McAx Sign Company, Inc.] manifested an unequivocal intention to be bound by group rather than individual action in collective bargaining, so that [its] refusal to sign the resulting collective barganing agreement amounted to a refusal to bargain." We hold that the findings of the administrative law judge, subsequently

affirmed by a three member panel of the Board, are supported by substantial evidence and that enforcement of the Board's remedial order is required.

I. THE FACTS

The administrative law judge's findings of fact may be summarized as follows.

[1,2] McAx, an employer engaged in the design, manufacture, and erection of electrical signs, had been a party to three collective bargaining agreements with Local 59 of the International Brotherhood of Electrical Workers (the Union) for periods from June 20, 1968 to June 30, 1971, July 12, 1971, to June 30, 1973, and July 1, 1973 to June 30, 1976. These agreements purported to be between the Union and the "Neon Electrical Sign Companies of Dallas, Texas", but the contracts were signed by the individual companies, including McAx.[1] Although the

[1]Apparently, "Neon and Electrical Sign Companies of Dallas, Texas" was an expression used for convenience in the contracts and did not denote a formal, multi-employer association. The administrative law judge found that while it "did not have any existence in the sense of having a constitution and bylaws, membership requirements, a place of business and the like, its name did appear on the contracts which [McAx] and his fellow contractors have signed for years as the 'Employer' and it may reasonably be inferred that its use reflected the fact that those contractors had agreed to act jointly". In its petition for review of the Board's order, McAx argues that because there was no formal association and only the individual companies were signatories to the contract, the administrative law judge erred as a matter of law in inferring an intent to act jointly. We disagree. "The signing of individual contracts does not negate the existence of a multi-employer unit". *N.L.R.B. v. Dover Tavern Owners' Association*, 412 F.2d 725, 727 n. 4 (3d Cir. 1969). This rule applies with equal force to the instant case, where the individual members of a multi-employer unit signed a single contract.

contracts themselves support the inference that each was negotiated by the employers as a unit, the only direct evidence of this practice in the record pertains to the 1973 negotiations.

The contract negotiated in 1973 provided that it would continue in effect until June 30, 1976, and thereafter on a year-to-year basis unless one of the parties gave written notice of its desire to modify or terminate the agreement sixty days prior to the renewal date. On April 30, 1976, McAx and two other companies, Heath and Company and J. F. Zimmerman & Sons, each submitted proposals to the Union. A negotiating meeting was scheduled for May 18.

Present at the May 18, 1976 meeting were McAx president Donald Simpson, representatives from Heath and Company, J. F. Zimmerman & Sons, and the A. B. C. Sign Company, all signatories to the 1973 agreement, and Herbert Hicks, representing the Union. The parties met and negotiated every Tuesday for the following five weeks. Minutes of these meetings reflect that at several points during the negotiations, the employers took time out to caucus and to consolidate their proposals into a single set. By the end of the meeting on June 22, 1976, most of the differences between the employers and the Union had been resolved except for a dispute as to an hourly wage increase. Hicks suggested that a mediator be obtained for the next meeting. The following day, however, the representative of Heath and Company requested a special meeting. All parties, with the exception of McAx, agreed to meet on Monday, June 28; Simpson, McAx's president, informed the Union that he could not attend the meeting because he had already made a business commitment for that day. On June 28, in Simpson's absence, the parties agreed to a wage increase of ten cents per hour more than had been agreed to earlier.

On July 2, 1976, in accordance with past practice, Union Business Manager James Foreman mailed to each employer a copy of the changes agreed to. Thereafter, each employer, except for McAx, acknowledged that the changes set forth in Foreman's letter were those agreed to in the negotiations. Hicks telephoned Simpson on July 12, but was unable to reach him. On July 22, Foreman informed Simpson by letter that the rate of pay of journeymen had been changed effective July 1 and asked that McAx comply with the terms of the new contract if it had not done so already.

McAx did not respond to the July 22 letter. Hicks made several additional unsuccessful calls on successive days, leaving his name and telephone number for Simpson to call, but no response was forthcoming. Hicks finally reached Simpson on July 29. At that time, Simpson told Hicks that he had not had a chance to review the changes mailed to him 27 days earlier, but that he would do so and call Hicks the next day. When he did not do so, Hicks hand delivered a copy of the new contract on July 30.

On August 2, Simpson informed the Union in writing that he would not sign the new contract for the stated reason that the hourly wage provisions were contrary to McAx's fiscal interests.

On the basis of these facts, the administrative law judge found a refusal to bargain in violation of the National Labor Relations Act:

> In summary, in light of a bargaining history which was to all outward appearances on a group basis, including the use of an association name, with all the contractors cosigning the same contract, plus the fact that the negotiations revealed a group approach to bargaining, the conclusion is warranted, and I find, that

> [McAx] had manifested an intention to be bound by group rather than individual action and that its refusal to sign the agreement agreed to by the group on June 28 was a refusal to bargain within the meaning of Section 8(a)(1) and (5) of the Act [29 U.S.C. §§158(a)(1) and (a)(5)].[2]

The Board affirmed the findings of the administrative law judge and adopted his recommended order requiring McAx to execute and honor the agreement reached on June 28, 1976, and to make its employees whole for any loss of earnings or other benefits they may have suffered by reason of McAx's refusal to sign.

[2]Were it not for other language in the administrative law judge's opinion, this finding would present a problem. As we have recently held, the test for determining whether a multi-employer bargaining unit has been established "is whether the employer members of the group have indicated from the outset an *unequivocal* intention to be bound by group action in collective bargaining . . . ." *N.L.R.B. v. Beckham, Inc.*, 564 F.2d 190, 192 (5th Cir. 1977) (emphasis added). In the quoted finding, the administrative law judge omitted the key qualifier "unequivocal", suggesting, at first glance, that he may have applied an erroneous legal standard. But the opinion as a whole makes clear that the judge recognized and applied correct standard. The analysis section opens with this statement: "Whether [McAx] was obligated to sign that agreement depends on whether or not [McAx] had indicated an *unequivocal intention* to be bound in collective bargaining by group rather than individual action". In applying the "unequivocal intention" standard, the administrative law judge quoted extensively from the Board's decision in *Joseph McDaniel*, 226 NLRB No. 120, subsequently enforced by this Court *sub nom. N.L.R.B. v. Beckham, Inc., supra.* In *Joseph McDaniel*, the Board held that an "unequivocal intention" could be inferred from "outward manifestations of intent to engage in group bargaining", concluding that "[a]n employer who, through a course of conduct or otherwise, signifies that it has authorized the group to act in its behalf will be bound by that apparent creation of authority". The administrative law judge, we conclude, analyzed the facts of this case under the applicable legal standard. We are satisfied moreover that he did indeed find the requisite talismanic "unequivocal intention".

II. THE ISSUES RAISED

McAx raises two primary objections to the conclusions of the administrative law judge, both of which are without merit.

First, McAx contends that, in affirming the administrative law judge's finding of an unequivocal intention to be bound by group action, the Board deviated from the legal standard that it announced in *Van Eerden Co.*, 154 NLRB 496, 499 (1965). Hence, it argues, enforcement should be denied under *National Fresh Fruit and Vegetable Co. v. N.L.R.B.*, 565 F.2d 1331, 1336 (5th Cir. 1978) and *N.L.R.B. v. Hi-Way Billboards, Inc.*, 500 F.2d 181, 184 (5th Cir. 1974). In *Van Eerden, Co.*, the Board stated:

> When employers have banded together informally to bargain, without expressly documenting their relationship to each other or to the union involved, we have often inferred the presence of the requisite intention from the facts that the employers have participated for a meaningful period of time in joint bargaining negotiations and have adopted substantially uniform contracts resulting therefrom. The ultimate question in these cases, however, is the actual intent of the parties, since multi-employer bargaining is a voluntary arrangement, dependent upon the real consent of the participants to bind themselves to each other for bargaining purposes. And where there is specific evidence, beyond the mere circumstances of joint negotiations and uniformity of contracts, indicating that the parties did not intend to accept the obligations and benefits of multi-employer bargaining, that evidence must be equally considered in determining the basic issue.

[3,4] We find no departure from these principles in this case. It is well estabished that the requisite intent may be inferred from a prior history of multi-employer bargaining

and the adoption of uniform contracts. See, e.g., *N.L.R.B. v. Johnson Sheet Metal, Inc.*, 442 F.2d 1056, 1060 (10th Cir. 1971); *N.L.R.B. v. Southwestern Colorado Contractors Ass'n*, 379 F.2d 360, 364 (10th Cir. 1967); *Bennett Stone Co.*, 139 N.L.R.B. 1422 (1962).[3] In this case, the prior dealings of the parties and the course of conduct during the 1976 negotiations amply supported an inference of unequivocal intent to be bound by group action. Furthermore, the administrative law judge did not deviate from the rule of *Van Eerden* that evidence "indicating that the parties did not intend to accept the obligations and benefits of multi-employer bargaining . . . must be equally considered in determining the basic issue".[4]

[5] The evidence presented by McAx to negate the inference of unequivocal intention was weighed and

[3]Most of the pertinent cases, including *N.L.R.B. v. Beckham, Inc.*, supra, have involved express statements that a group of employers would negotiate as a single unit. Time and again, however, the Board has stated the relevant test in the disjunctive: a multi-employer bargaining unit may be established *either* by "a controlling history of collective bargaining on such basis, *or* an unequivocal agreement of the parties to bind themselves to a course of group bargaining in the future". *Electric Theatre, Inc.*, 156 NLRB 1351, 1352 (1966) (emphasis added). See also *Bennett Stone Co.*, 139 NLRB 1422 (1962). Thus, the absence of a clear expression of intent in this case is no bar to a finding that a multi-employer bargaining unit existed.

[4]In its brief, McAx argues that *Van Eerden* controls this case and requires, as a matter of law, a finding that McAx approached the 1976 negotiations on an individual rather than a group basis. In *Van Eerden*, however, there was extensive evidence that all of the employers regarded the negotiations as individual and agreed that none would be bound by group action, that each reserved the right to bargain independently, and that the union representative understood that the employers could terminate the negotiations "at any time". *Van Eerden* is thus clearly distinguishable from the instant case.

rejected by the administrative law judge. McAx argued first that the unilateral decision by three of the four employers to request modification of the 1973 contract on April 30, 1976, is inconsistent with a group approach to bargaining. The administrative law judge found, however, that the subsequent approach to the negotiations as a group, including the preparation of a consolidated employer proposal, negated the inference urged by McAx. McAx also relied upon the fact that Simpson ultimately refused to sign the agreement. In response, the administrative law judge found that McAx's "reasons for rejecting the contract as set forth in its August 2 letter are clearly a belated attempt to avoid the legal consequences of its past conduct". These inferences drawn by the administrative law judge are supported by substantial evidence in the record and may not be disturbed by this Court. See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456 (1951); *N.L.R.B. v. Allis-Chalmers Corp.*, 563 F.2d 674 (5th Cir. 1977).

In finding the requisite "unequivocal intention" the administrative law judge noted that, in spite of many opportunities to do so, McAx never expressed an intention *not* to be bound by collective action. We agree that under the facts of this case McAx's failure to reserve the right to dissent supports a clear inference of intent to be bound by group action. Cf. *N.L.R.B. v. Southwestern Colorado Contractors Ass'n, supra*, 379 F.2d at 364.

So far as the record discloses, the first time that McAx took the position that it was not bound by group action was on October 1, 1976, in response to a complaint filed against it by the regional office of the N.L.R.B. purusant to charges filed by the Union *after* Simpson refused to sign the contract.

Without a single indication to the contrary, the activities of Simpson, McAx's chief executive officer and designated bargaining agent in the ongoing multi-employer contract negotiations with the Union, all point inexorably and inescapably to the conclusion that his belated disclaimer to be bound by the joint negotiations was no more than an afterthought, perhaps as a result of consultation with counsel. Simpson attended and participated in the first six negotiating sessions—on May 18, May 25, June 1, June 8, June 15, and June 22, 1976—without caveat. He did not attend the critical and final session of June 28, 1976, as he explained to Union representative Hicks, because "I made some commitments with out of town people that makes it impossible for me to attend . . ." In three weeks following the June 28 session, Simpson was twice informed of the terms agreed upon at that session, by letters from Union Business Agent Foreman dated July 2 and 22, 1976; he did not respond to these letters or return any of the repeated telephone calls made to him by Foreman and Hicks. When Hicks was finally able to reach Simpson by telephone on July 29, Simpson stated only that he had not yet had a chance to review the changes.[5] On August 2, in explaining

[5]We find contrary to our own common experience with mankind, and hence unworthy of belief, Simpson's statement that, although he had the final proposed changes in the labor agreement in his possession for 27 days, he had not on July 29 had an opportunity to review them. The information in the report dealt with the single most critical business concern of this employer for the next three years: the wage scale for its employees. As did the administrative law judge, we view Simpson's statement to Hicks that he had had no opportunity to review the proposed contract changes in the intervening 3-4 week period—as not made in good faith and as no more than a bungling attempt to avoid the legal consequences of his prior conduct. If Mr. Simpson had sought legal advice early rather than late, it may be that he would have fared better.

his reasons for refusing to sign the contract, Simpson wrote:

> After long and careful review, we find that to become a party to the agreement in question would seriously impair our opportunity for healthy fiscal operation and would severely restrict our company's future.
>
> For these reasons, I cannot enter into and sign this agreement for McAx Sign Company, Inc.

[6] The Board has repeatedly held that withdrawal from a multi-employer bargaining unit is untimely if attempted after the commencement of negotiations. See, e.g., *N.L.R.B. v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55, 57 (10th Cir. 1966); *N.L.R.B. v. Sheridan Creations, Inc.*, 357 F.2d 245 (2d Cir. 1966), cert. denied, 385 U.S. 1005, 87 S. Ct. 711, 17 L.Ed.2d 544; *N.L.R.B. v. Sklar*, 316 F.2d 145 (6th Cir. 1963). This rule is intended to minimize disruption of the bargaining process by preventing an employer from using the threat of withdrawal from negotiations as a "bargaining lever". *N.L.R.B. v. Sheridan Creations, Inc., supra*, 357 F.2d at 248. In light of the administrative law judge's findings in this case, to accept McAx's ultimate refusal to sign a collective bargaining agreement not to its liking as proof that it never intended to be bound by group action would thwart the rule governing withdrawal from multi-employer bargaining units.

[7] McAx also argues that the Board deviated from the rule that unequivocal intent must be manifested "from the outset", *Joseph McDaniel*, 226 NLRB No. 120, enforced sub nom. *N.L.R.B. v. Beckham, Inc., supra*, because it relied upon evidence that the employers' individual proposals were consolidated *after* negotiations commenced. This argument assumes that the submission of individual proposals before or at the commencement of negotiations is consistent only with an intent to bargain individually, an

assumption which we reject. The submission of individual proposals in this case was an ambiguous act because it was not accompanied by any express statement of intent. Its meaning thus had to be inferred from the surrounding circumstances. Here, as the administrative law judge noted, the three individual proposals were made after a history of multi-employer bargaining and served merely as a starting point for an eventual consolidation to facilitate bargaining as a unit. Under these circumstances, the Board was justified in basing its finding of intent from the outset in part upon conduct which occurred during the negotiations.

Substantial evidence in the record supports the finding of both the administrative law judge and the Board that McAx indicated from the outset an unequivocal intention to be bound by group rather than individual action. McAx is thus bound by the contract negotiated by the group.

McAx's petition for review is denied; the order of the National Labor Relations Board is ordered

ENFORCED.

GODBOLD, Circuit Judge, dissenting:

I respectfully dissent.

The ALJ did not find the required "*unequivocal intention*" to be bound by group collective bargaining, and I am not willing to join in patching up his findings at the appellate level to make them meet the correct legal standard. See note 2 of majority opinion and accompanying text. On the thin and equivocal evidence in this case it is pure speculation to assume tnat the ALJ meant "unequivocal" when he did not say so. Indeed, one could infer that he could not bring himself to make a finding so embarrassingly bereft of support.

The fulcrum of this case is the alleged evidence of a past history of group collective bargaining. First, a multi-

employer bargaining unit may be established by unequivocal and express agreement of the parties to bind themselves to group bargaining or by a controlling history of collective bargaining on such basis. See footnote 3 of majority opinion. There being no express agreement, the majority stand on the alternative of "a controlling history of collective bargaining on such basis."

Second, to meet the requirement of unequivocal intent to be bound by group action (based upon circimstances other than express agreement), the majority infer unequivocal intent and base that inference in part upon dealings of the parties prior to 1976.

Third, the unequivocal intent to engage in group bargaining must be manifested from the outset of the negotiations. The 1976 bargaining began with the submission of individual proposals from the various employers. This was not merely equivocal action but affirmatively tended to show intention not to engage in group bargaining. To get these embarrassing circumstances out of the case the majority lean again upon the reed of the alleged prior history of group bargaining.

Thus the thread of alleged history of prior group bargaining runs all through the case and props it up at every critical juncture. There is no substantial evidence of prior group bargaining. The majority cite none and the ALJ cited none. Rather the ALJ inferred from the single expression "Neon and Electrical Sign Companies of Dallas, Texas," used in past contracts, that the parties thereto had agreed to negotiate jointly in making the past contracts, although the past contracts had been signed by individual employers each deisgnating himself as "Employer." One need not rely on the shibboleth of inference on an inference to see that what has been done here is impermissible. On the basis of

the use of a single term, and no other evidence, the Board and the majority have drawn an inference with regard to the nature of unrevealed and undescribed bargaining negotiations conducted in 1968, 1971 and 1973, and then have used this inference to draw the critical inferences described above relating to 1976 negotiations. This attenuated bootstrapping is not substantial evidence.

In *NLRB v. Beckham, Inc.*, 564 F.2d 190 (C.A.5, 1977), a divided Board and a divided panel of this court found sufficient evidence of unequivocal intention to participate in multi-employer bargaining. The flimsiness of the present case is demonstrated by comparing it with the facts which in *Beckham* were held sufficient by two divided review bodies. In *Beckham* the prior bargaining history was proved. Members of the employers' association had bargained with the union as a group but with the purpose of signing individual contracts. Before the contract in issue was negotiated the association amended its bylaws to enable it to act as a multi-employer bargaining unit and negotiate a single contract for its members. At a meeting of the association it was announced that there would be group bargaining for a single contract. All members present except Beckham agreed. Negotiations began and the representative of the employers' association told the union that the association was negotiating for members as a group instead of for individual contracts as in the past. Beckham was present and never indicated disagreement with the statement. The union agreed to negotiate with the association as a multi-employer unit. At the final negotiating session the employers reported that they agreed to the contract except that Beckham needed relief from one provision, and the union stated it would not object to

Beckham's getting a waiver from his employees on this provision. Beckham and all others shook hands and stated they had an agreement. After Beckham was unable to get a waiver he took the position he was not bound. In the present case there is no factual evidence of prior bargaining history, no formal employers' association, no evidence that an association even exists except for the descriptive term used in the preceding contracts, no pre-bargaining agreement among employers that the group was negotiating as a unit, no announcement at the meetings that the negotiations were group in nature, no agreement by the union that the negotiations were with employers as a group. The post-bargaining actions of McAx were equivocal, but they do not rise to the level of the implied recognition given by employer Beckham in asking for a waiver.

The Board order should not be enforced.

U. S. COURT OF APPEALS
FILED

AUG 1 1978

APPENDIX 1

EDWARD W. WADSWORTH
CLERK

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

McAX SIGN COMPANY, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 77-3013
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

JUDGMENT

Before: GODBOLD, SIMPSON AND MORGAN, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by McAx Sign Company, Inc., to review an order of the National Labor Relations Board issued against said petitioner, Dallas, Texas, its officers, agents, successors, and assigns on August 31, 1977, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on May 15, 1978, and has considered the briefs and transcript of record filed in this cause. On July 10, 1978, the Court being fully advised in the premises, handed

down its decision denying the petition to review and granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the petition for review filed by McAx Sign Company, Inc., Dallas, Texas, be and it is hereby denied and the said Order of the National Labor Relations Board in said proceeding be enforced, and that petitioner, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

Costs are taxed against petitioner.

ENTERED: AUG 1, 1978
Issued As Mandate:

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ARD W. WADSWORT
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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-3013

McAX SIGN COMPANY, INC.,

Petitioner
Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent
Cross-Petitioner.

Petition for Review and Cross Application for Envorcement of An Order of the National Labor Relations Board

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ON PETITION FOR REHEARING

(September 21, 1978)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ Bryan Simpson
United States Circuit Judge

APPENDIX D

JD-297-77
Dallas, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

McAX SIGN COMPANY, INC.

and Case No. 16-CA-6726

LOCAL UNION 59, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Ransom A. Ellis, III, Esq., of Fort Worth, TX, for the General Counsel.

Thomas E. Kurth, Esq., and Robert G. Mebus, Esq. (Seay, Gwinn, Crawford, Mebus & Blakeney), of Dallas, TX, for Respondent.

David R. Richards, Esq. (Clinton & Richards), of Austin, TX, for the Charging Party.

DECISION

Statement of the Case

HENRY L. JALETTE, Administrative Law Judge: This proceeding involves allegations that the above-named Respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign a collective-bargaining agreement the terms of which had been agreed to by an alleged multiemployer association. The issue presented is whether or not Respondent is bound by the agreement reached by the alleged association. The proceeding was initiated by a charge filed on August 9, 1976[1] by the above-named Union, pursuant to which complaint issued on September 23. On December 3 and 4, hearing was held in Dallas, Texas.

Upon the entire record, including my observation of the witnesses, and after consideration of the briefs filed by the parties, I hereby make the following:

Findings of Fact

I. The Facts

Respondent is an employer engaged in the design, manufacture and erection of electrical signs.[2] Prior to 1976, Respondent was a party to three collective-bargaining agreements with the Union for periods from June 20, 1968

[1]Unless otherwise indicated all dates hereinafter are in 1976.

[2]Jurisdiction is not in issue. Respondent admits it meets the Board's direct inflow standard for the assertion of jurisdiction.

to June 30, 1971; July 1971 to June 30, 1973; and July 1, 1973 to June 30, 1976. These agreements purported to be between the Union and the Neon and Electric Sign Companies of Dallas, Texas (herein called NESCDT), but the contracts were signed by individual contractors.

When the time for renewal of the contracts arrived, it was the practice of the Union to submit proposed changes to the individual contractors and the individual contractors would, in turn, submit their proposed changes directly to the Union. On April 30, Respondent, Heath and Company and J.F. Zimmerman & Sons, each submitted proposals to the Union. Thereafter, a negotiating meeting was scheduled for May 18.

The May 18 meeting was attended by Respondent's president, Donald Simpson, and the two contractors named above, plus a representative of the A.B.C. Sign Company. Union business agent Herbert Hicks was made chairman of the meeting and Dan Rippe, the representative of Heath and Company, was made secretary with the duties of keeping minutes of the meeting and making necessary contacts with the contractors in between meetings. After May 18, the parties met again on May 25, June 1, June 8, June 15, and June 22.

At the end of the June 22 meeting, according to Hicks, the parties had pretty well ironed out all of the problems except for a difference of 10 cents with regard to an hourly wage increase and Hicks told the contractors that a mediator should be obtained for the next meeting. The following day, Mahaffey of Heath and Company called and asked to meet again. Because the contract was about to expire and the Union had a membership meeting scheduled for June 28, the parties agreed to meet on June 28. On that

date, the Union representatives and all the contractors who had been meeting since May 18, except Respondent, held a meeting at which an agreement was reached providing *inter alia*, for a wage increase 10 cents per hour more than had been agreed to earlier. That same day, the union membership ratified the agreement.

On July 2, in accordance with past practice, Hicks mailed to each contractor a copy of the changes agreed to. Thereafter, each contractor, except Respondent, notified the Union by mail or telephone that the changes as set forth in his letter were as agreed to in negotiations. The Union received no reply from Respondent and Hicks testified he telephoned on July 12 but was unable to speak to Simpson. On July 22, the Union wrote to Respondent serving notice of the change in the rate of pay of journeymen effective July 1 and advising Respondent to take appropriate action if the rate had not been raised as of July 1.

Respondent did not reply to this letter and it was not until July 29 that Hicks was able to reach Simpson by telephone after several unsuccessful calls. On that date, Simpson told Hicks he had not had a chance to review the changes, but he would do so and call Hicks the next day. When he did not do so, Hicks hand delivered a copy of the contract on July 30.

On August 2, Respondent sent a letter to the Union in which it stated that it would not sign the agreement because it failed to include requested changes and it included changes to which it had not agreed.

II. Analysis and Conclusions

General Counsel contends that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to sign the

agreement orally agreed to on June 28. Whether Respondent was obligated to sign that agreement depends on whether or not Respondent had indicated an unequivocal intention to be bound in collective bargaining by group rather than individual action.[3] In this case, there are no express statements either by Respondent or by the other contractors engaged in group negotiations signifying what their intention was in bargaining as a group, nor is there a formal delegation of authority from the individual employer to the multiemployer group. Moreover, there is no formal association structure binding the bargaining participants. (The agreements which the contractors have negotiated over the years purported to be between the Union and NESCDT; however, there is no organization of that name, and no one knew when, where, or how such a name came into existence.)

On the basis of the foregoing facts, plus the facts that the Union submitted its contract proposals to the individual contractors, who, in turn, submitted separate proposals, formulated by each individual contractor without consultation with other contractors, and that the contractors participated individually in the negotiations without a spokesman (if one contractor spoke more than others, there is no evidence it was attributable to his having been designated spokesman), Respondent contends a finding that it had agreed to be bound by group bargaining is not warranted. I do not agree.

In evaluating an employer's intention when engaged in group bargaining, the Board has pointed out that:[4]

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[3] *Bill O'Grady Carpet Service, Inc.*, 183 NLRB 587.

[4] *Joseph McDaniel, an Individual Proprietorship, d/b/a Custom Colors Contractors*, 226 NLRB No. 120, page 7.

> The manifestation of an "unequivocal intention" to be bound requires something less, however, than a solemnly executed document signed and sealed with hot wax. A commitment to bargaining on a multi-employer basis will not be made to depend on the presence of a formal associational structure among the bargaining participants or on the formal delegation of authority from the individual employer to the multi-employer group.[10] Nor will the Board, faced with outward manifestations of intent to engage in group bargaining, consider as controlling an employer's private manifestations of dissent. An employer who, through a course of conduct or otherwise, signifies that it has authorized the group to act in its behalf will be bound by that apparent creation of authority.[11] (Citations omitted.)

From that statement, it can clearly be seen that the absence of evidence of a formal delegation of authority by Respondent to the contractors engaged in negotiations with him and the absence of any evidence that NESCDT had any formal structure do not preclude a finding of the requisite unequivocal intention. The objective facts appearing in the record are that for a number of years Respondent and the other contractors referred to above, have negotiated jointly and have been cosignatories to a single contract. While NESCDT did not have any existence in the sense of having a constitution and bylaws, membership requirements, a place of business and the like, its name did appear on the contracts which Respondent and his fellow contractors have signed for years as the "Employer" and it may reasonably be inferred that its use reflected the fact that those contractors had agreed to act jointly.

As to the pre-negotiation procedure of individual submissions of proposals, Respondent rightly argues that

such procedure is an indicium of individual bargaining; however, union representative Hicks testified that during the negotiations, after caucusing, the contractors consolidated the separate proposals into a single set of proposals which formed the basis of negotiations thereafter. The minutes of the May 25 meeting confirm the testimony. Section IV thereof states: "It was agreed to try for a package to present Local 59 covering all parties involved at the next meeting, i.e. to drop or hold on proposals." The minutes of the June 1 meeting reveal in Section VI that the contractors' proposals were consolidated. Section VII of the minutes recites that "Union agreed to take under advisement as a committee proposals: e, f, h, g, i." Such conduct is patently group action. Respondent argues otherwise on the ground that at no time during the negotiations did Simpson state that he was dropping any of his proposals. However, Respondent adduced no testimony whatsoever that at any of the meetings did Simpson assert a position independent of the group position and that he told the Union he reserved the right to reject any contract that did not include his proposals. In effect, then, Respondent's position is reduced to a "private manifestation of dissent."

The evidence of Respondent's intention to be bound by group action does not end with the June 22 meeting. As Hicks testified, on July 2 he mailed to Respondent a copy of the contract changes agreed to. Respondent never replied and offered no explanation for not doing so. Nor did it reply to Hicks' letter of July 22. Even on July 29, 1 month after the meeting at which agreement was reached, when Hicks finally succeeded in reaching Simpson, and when Simpson knew that the Union deemed him bound by the contract as evidenced by its July 22 letter, Simpson did not assert that

he was not bound. To the contrary, he stated he had not had a chance to review the changes. Even if that was the case, he knew the contract called for a 10 cent wage increase more than he had agreed to and could have so stated. In short, Respondent's reasons for rejecting the contract as set forth in its August 2 letter are clearly a belated attempt to avoid the legal consequences of its past conduct.

As to the June 22 meeting, there is a conflict in testimony regarding which issues remained unresolved at the end of the meeting and whether or not Hicks admitted to an impasse. Were it necessary for decision, I would credit Hicks' testimony; however, assuming, *arguendo*, that Simpson's testimony was credited, it would not alter the result. Simpson said nothing at the meeting to negate the conclusion that he was committed to group action, and, if Hicks declared an impasse, it avails Respondent nothing as it did not withdraw from the multiemployer group either then or until its rejection of the contract on August 2 after the impasse had been broken. It was then too late.

In summary, in light of a bargaining history which was to all outward appearances on a group basis, including the use of an association mane, with all the contractors cosigning the same contract, plus the fact that the negotiations revealed a group approach to bargaining, the conclusion is warranted, and I find, that Respondent had manifested an intention to be bound by group rather than individual action and that its refusal to sign the agreement agreed to by the group on June 28 was a refusal to bargain within the meaning of Section 8(a)(1) and (5) of the Act.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth above, occurring in connection with its operations described above, have a close, intimate and substantial relationship of trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate affirmative action designed to effectuate the policies of the Act. In particular, I shall recommend that Respondent be ordered to execute and honor the collective-bargaining agreement containing all of the provisions of the collective-bargaining agreement entered into by the other members of the Neon Electrical Sign Contractors of Dallas, Texas.[5]

It appears that employees of Respondent have suffered loss of earnings and other benefits by reason of Respondent's refusal to sign the above-mentioned agreement. Accordingly, it is hereby recommended that Respondent

[5]The record indicates that Section 2.29 of the contract which was ultimately signed by the other members of NESCDT was different from Section 2.29 in the contract submitted to Respondent for execution on July 30. This is no reason to excuse Respondent from executing the contract as it is clear that the other members of NESCDT have acquiesced in the change in Section 2.29 (which relates to the submitting of work) and Respondent is bound by that action.

make its employees whole for any loss of earnings or benefits they may have suffered to be computed in accordance with the formula set forth in *F.W. Woolworth Company*, 90 NLRB 289, with interest at the rate of 6 percent per annum in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716. In addition, Respondent shall make all payments to the Local Employees Benefit Board as provided for in said agreement. *N.L.R.B. v. Strong d/b/a Strong Roofing and Insulation Co.*, 393 U.S. 537.

Conclusions of Law

1. McAx Sign Company, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union 59, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees engaged in manufacturing, assembling, erection, service, dismantling, and removing operations employed by Employer members of Neon and Electrical Sign Companies of Dallas, Texas, and by McAx Sign Company, Inc., but excluding office clericals, guards, watchmen, and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Local Union 59, International Brotherhood of Electrical Workers, AFL-CIO, has been at all material times herein, and is now, the representative of a majority of the

employees in the aforesaid unit, and by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of all employees of said unit for the purposes of collective bargaining.[6]

5. By failing and refusing to execute or become party to the collective-bargaining agreement negotiated by the Employer members of Neon and Electrical Sign Companies of Dallas, Texas and Local Union 59, International Brotherhood of Electrical Workers, AFL-CIO, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) and 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[7]

ORDER

Respondent, McAx Sign Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with Local Union 59, Interna-

[6]No affirmative evidence of the Union's majority status in the appropriate unit was adduced at the hearing, but there is a presumption of majority arising out of the history of collective bargaining and the Union's incumbency as representative of the unit employees, a presumption which was not rebutted by Respondent.

[7]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

tional Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of its employees in the unit described above, by failing and refusing to execute or become party to the collective-bargaining agreement negotiated between Neon and Electrical Sign Companies of Dallas, Texas and Local Union 59, International Brotherhood of Electrical Workers, AFL-CIO.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form, join or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the Act or to refrain from any or all activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Forthwith execute and honor the agreement negotiated by the Employer members of Neon and Electrical Sign Companies of Dallas, Texas and Local Union 59, International Brotherhood of Electrical Workers, AFL-CIO.

(b) Make its employees whole for any loss of earnings or other benefits they may have suffered by reason of Respondent's failure and refusal to execute and abide by the aforesaid agreement in the manner set forth in the section entitled "The Remedy."

(c) Pay to the Local Employees Benefit Board the sums provided for in the aforesaid agreement.

(d) Post at its Dallas, Texas facility, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for Region 16, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply herewith.

Dated, Wasington, D.C. May 4, 1977

/s/ Henry L. Jalette
Henry L. Jalette
Administrative Law Judge

[8]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

FORM NLRB-4727
(9-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain collectively with LOCAL UNION 59, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, by failing and refusing to execute and honor the agreement negotiated with said Union by THE NEON AND ELECTRICAL SIGN COMPANIES OF DALLAS, TEXAS.

The appropriate bargaining unit is:

All production and maintenance employees engaged in manufacturing, assembling, erection, service, dismantling, and removing operations, employed by Employer members of Neon and Electrical Sign Companies of Dallas, Texas, and by McAx Sign Company, Inc., but excluding office clericals, guards, watchmen, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

WE WILL NOT in any like manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL forthwith execute and honor the agreement negotiated by NEON AND ELECTRICAL SIGN COMPANIES OF DALLAS, TEXAS and LOCAL UNION 59, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.

WE WILL make our employees whole for any loss of earnings or other benefits they may have suffered by reason of our failure and refusal to execute and abide by the aforesaid agreement.

WE WILL pay to the Local Employees Benefit Board the sums provided for in the aforesaid agreement.

McAX SIGN COMPANY, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 8-A-24, 819 Taylor Street, Fort Worth, Texas 76102 Telephone 817 - 334-2941.

APPENDIX E

JMW

231 NLRB No. 158

D—2891
Dallas, Tex.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

McAX SIGN COMPANY, INC.

and Case 16—CA—6726

LOCAL UNION 59, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

DECISION AND ORDER

On May, 1977, Administrative Law Judge Henry L. Jalette issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of

the Administrative Law Judge, to modify his Remedy,[1] and to adopt his recommended Order.

D—2891

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, McAx Sign Company, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. August 31, 1977.

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1]In accordance with our decision in *Florida Steel Corporation*, 231 NLRB No. 117 (1977), we shall apply the current 7-percent rate for periods prior to August 25, 1977, in which the "adjusted prime interest rate" as used by the Internal Revenue Service in calculating interest on tax payments was at least 7 percent.